Nos. 06-616 and 06-626

In The Supreme Court of the United States

CITY OF KENNEWICK, *et al.*,

Petitioners,

v.

KEN ROGERS, *et ux.*,

Respondent.

RICHARD DOPKE, *et ux.*,

Petitioners,

v.

KEN ROGERS, *et ux.*,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether police officers violated the Fourth Amendment rights of an innocent person sleeping in a backyard when an intentionally deployed police canine bit and held him while the officers beat and handcuffed him?

2. Whether those officers are entitled to summary judgment on qualified immunity?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
Factual Background	1
Procedural Background	8
REASONS FOR DENYING THE WRIT	8
A. THE LOWER COURTS AGREE THAT USING A CANINE AGAINST A NON-VIOLENT MISDEAMENANT VIOLATES THE FOURTH AMENDMENT.	9
1. Rogers Was Seized When the Officers Employed the Canine to Search and Detain Him.	10
2. The Officers Intended to Seize Rogers.	12
3. The Use of a Bite-and-Hold Canine to Detain a Non-Threatening Misdeamenant Violates the Fourth Amendment.	15
B. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.	16
1. The City of Kennewick, Officers Kohn and Bonnalie, and Deputy Quackenbush Violated Respondents' Clearly Established Constitutional Rights.	17
2. Sgt. Dopke Violated Respondents' Clearly Established Constitutional Rights.	19

TABLE OF CONTENTS – Continued

Page

C. THE COURT OF APPEALS' DECISION DOES NOT RELY UPON, BUT IS CONSISTENT WITH, *BROWER* AND *LEWIS*..... 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Adrade v. City of Burlingame, 847 F. Supp. 760 (N.D. Cal. 1994) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12

Berg v. County of Alleghany, 219 F.3d 261 (3d Cir. 2000) 21

Brosseau v. Haugen, 543 U.S. 194 (2004) 17

Brower v. County of Inyo, 489 U.S. 593 (1989) 15, 20

Bublitz v. Cottey, 327 F.3d 485 (7th Cir. 2003) 21, 22

California v. Ciraolo, 476 U.S. 207 (1986) 18

Cardona v. Connolly, 361 F. Supp. 2d 25 (D. Conn. 2005) 11, 12

Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) 19, 20

Connecticut v. Johnson, 460 U.S. 73 (1983) 12

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 21

Dennen v. City of Duluth, 350 F.3d 786 (8th Cir. 2003) 11

Dunnigan v. Noble, 390 F.3d 486 (6th Cir. 2004) 21, 22

Fidler v. City of Indianapolis, 428 F. Supp. 2d 857 (S.D. Ind. 2006) 11

Gander v. Wood, ___ F. Supp. 2d ___, 2006 WL 2945964 (D. Or. 2006) 10

Graham v. Connor, 490 U.S. 386 (1989) 15

Henderson v. Munn, 439 F.3d 497 (8th Cir. 2006) 15

Jarrett v. Town of Yarmouth, 331 F.3d 140 (1st Cir. 2003) 10, 18

TABLE OF AUTHORITIES – Continued

Page

Kopf v. Wing, 924 F.2d 265 (4th Cir. 1991) 14

Kuha v. City of Minnetonka, 365 F.3d 590 (8th Cir. 2003) 14, 17

Loria v. Gorman, 306 F.3d 1271 (2d Cir. 2002) 16

Marley v. City of Allentown, 774 F. Supp. 343 (E.D. Pa. 1991) 16

Marquez v. Andrade, 79 F.3d 1153 (9th Cir. 1996) 12

Matthews v. Jones, 35 F.3d 1046 (6th Cir. 1994) 14

Medeiros v. O'Connell, 150 F.3d 164 (2d Cir. 1998) 22

Mendoza v. Block, 27 F.3d 1357 (9th Cir. 1994) 18

Phelps v. Coy, 286 F.3d 295 (6th Cir. 2002) 19

Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1998) 14

Ruvalcaba v. City of Los Angeles, 167 F.3d 514 (9th Cir. 1999) 14

Saucier v. Katz, 533 U.S. 194 (2001) 17

Schultz v. Braga, 455 F.3d 470 (4th Cir. 2006) 22

Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005) 14, 16

Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003) 18

United States v. Lawshea, 461 F.3d 857 (7th Cir. 2006) 10

Vathekan v. Prince George's County, 154 F.3d 173 (4th Cir. 1998) 17

Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1997) 14

TABLE OF AUTHORITIES – Continued

Page

Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002)..... 16

Watkins v. City of Oakland, 145 F.3d 1087 (9th Cir. 1998)..... 19

MISCELLANEOUS

S. Ct. R. 10 20

STATEMENT OF THE CASE

Factual Background

At approximately 12:55 a.m. on July 13, 2003, Sergeant Richard Dopke of the Kennewick, Washington Police Department saw a shirtless man riding a mini motorcycle or moped without a helmet or proper lights, both of which are civil traffic infractions. Pet. App. 20a-21a.[1] The driver failed to stop after Dopke activated his overhead lights and siren, but did not speed or drive recklessly. *Id.*, 20a-21a, 33a. Dopke followed the driver to 6902 W. Umatilla in Kennewick, Washington. *Id.* at 21a. The driver pulled the motorcycle into the garage, and a woman closed the garage door behind him. *Id.* Dopke called for backup, including a police dog (K-9) team. *Id.* Dopke and another officer knocked on the door of 6902 W. Umatilla and asked the person riding the moped to identify himself so Dopke could issue a citation and be on his way. *Id.* Dopke was told that the operator's name was "Troy" and that he had gone out the back door. *Id.*

Although Sgt. Dopke did not fully believe that "Troy" had left the home, he authorized the use of the K-9, Deke, to "track and apprehend" the suspect. Pet. App. 22a and 38a. Initially, Deke was taken to the backyard of 6902 W. Umatilla, where he picked up a scent. *Id.* 22a. Deke was trained to "bite and hold" suspects, and had been known to cause physical harm to suspects in the past. Pet. App. 22a. Dopke testified as to his intent as follows:

> Q. Okay. So it would seem to me that sitting or standing in Officer Kohn's shoes that you

[1] For ease of reference, all references to the Petitioners' Appendix refer to the appendix filed in 06-616.

[Dopke], as supervisor, were directing him to use the K-9 to track the suspect in the back-yards of other people that night?

A. Yes.

Q. In this residential neighborhood?

A. Yes.

Q. And that would include entering the fenced area backyards of these homes?

A. Yes.

Q. Without a warrant?

A. Yes.

Q. And without asking permission of the owners to enter their property?

A. Yes.

Q. In pursuit of a suspect that we've identified was operating this moped?

A. Yes.

ER 64-65; Underlining added.[2]

Kohn testified in deposition:

Q. Okay. Did you understand that Sgt. Dopke was asking you to actually track and apprehend; was that your understanding?

A. That was my understanding.

ER 95-96; Underlining added.

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[2] Citations are to the Ninth Circuit Excerpts of Record (ER) for Ninth Cir. Case No. 05-35300.

Benton County Deputy Quackenbush, who was assisting in the pursuit, confirms the intent to use Deke in the backyards of the houses to the immediate north in his original narrative of the events:

> Officer Kohn advised us that due to the indications given by the K9, he wanted to search the backyards of the residences that were to the immediate north of 6902 W. Umatilla.

ER 308; Underlining added.

Officers Kohn and Bonnalie, and Quackenbush, started searching the backyards of the homes to the North of 6902 W. Umatilla. Pet. App. 22a.; ER 310. While searching the driveway at 6911 W. Victoria, Deke picked up a scent, and Kohn made an intentional decision to release Deke and let him "work." *Id.* 43a. No announcement or warning was made by Kohn that a police dog was going to be released. Pet. App. 43a; ER 145. The District Court noted that there is a conflicting testimony as to whether Deke's leash became tangled before Deke was released to work. Pet. App. 22a. However, Kohn testified that he thought it "prudent" to unleash Deke and let him "work." ER 180. Officer Quackenbush testified: "He [Kohn] allowed the dog to search off the leash." ER 84. No command was given for Deke to stay when he was released. ER 92-93. Kohn's silence after his release of Deke was a nonverbal command for Deke to continue to search and to apprehend by biting and holding whomever it was he had smelled. ER 248; 249.

Almost immediately after being released, Deke jumped through or over the fence into the backyard of 6911 W. Victoria. Pet. App. 23a; ER 310. Deke was not ordered to come back after he went through the fence. ER

92-93. Officer Kohn heard a yell, and peered over the fence and saw that the canine had bitten and was holding a man by the arm. Pet. App. 23a. Officer Kohn and two other officers kicked down the fence and entered the back yard. Pet. App. 46a. The officers did not have a warrant to enter the enclosed area. There was no probable cause to enter the backyard – even Defendants do not claim that a dog's "detection" constitutes probable cause. *Id.*, 33a-34a. There is no evidence that the officers felt threatened or endangered. Troy was not armed, and the officers did not feel threatened – they did not pull their guns before, during or after they entered the back yard of 6911 Victoria. *Id.*, 34a.

Rather than calling off Deke and releasing Mr. Rogers, the officers began striking him with their fists, knees, and flashlights, while allowing Deke to continue to bite Rogers. *Id.* Mr. Rogers was placed in handcuffs. *Id.*, 32a.

The officers then announced "We got him," and took him to a police car. *Id.*, 26a. At the police car, Dopke told Rogers: "If [you] just would have stopped, [you] would have received a ticket." ER 275. The officers continued to try to get Rogers to confess: "Make it easy on yourself, admit it, Judge Hollenbeck is a hard ass and he will throw the book at you . . . We know you did it, we have it on video. . . . We have a witness that has identified you." ER 275.

However, Mr. Rogers was not "Troy," the man on the moped. Rather, Mr. Rogers was a fifty-year-old salesman with Georgia Pacific. Pet. App. 23a. The backyard belonged to Mr. Rogers' daughter and son-in-law, and Mr. Rogers had fallen asleep there because one of the two locks on the door had inadvertently been locked. *Id.* Rogers testified that he had been woken up by sounds coming

from the driveway. *Id.*, 24a. Rogers described the events as follows:

> I jumped up and with authority, volume and clarity yelled, "Hey, what's going on?" . . . . I was sure this would scare off someone if they were up to no good. . . . There was no verbal response of any kind to my question. There was no light flashed in my direction.
>
> At this moment I felt a brief sense of relief. However, abruptly (2-3 seconds) that all changed when I was attacked by a large furious dog. I did not see the dog in the dark until the last moment as it was lunging at my throat. The dog clamped its jaws on my left arm as I reacted to his lunge at my throat. I was able to tear the dog away briefly by grabbing the top of his mouth (it had a elongated muzzle), but he came right back at me and again was biting down on my arm. This time the dog bit well through my jacket and sunk its teeth deep into the flesh of my arm. During the struggle with the unknown dog, I was spun 180 degrees, stumbling trying to gain my equilibrium and balance. My focus was entirely on getting the dog off my arm.
>
> At this point I heard the fence and/or gate being kicked down. I began yelling and screaming loudly knowing I had to get free from the dog. My back was now to the gate and fence, I could not see what was coming. I was then blindsided with several blows from what felt like fists and baseball bats to my head, sides of my face, back and lower back. I was then driven into the ground as I was already collapsing from the multiple blows. I was sure a group of prowlers had turned their dog on me and I was in the process of being beaten, kicked and bitten on my upper arm and

neck by the dog. My bare legs were cut and bleeding. I could feel and taste the blood coming from my face and head wounds. I was sure the only punishment left was to get stabbed by a knife or shot by a gun. I was completely overwhelmed and was defenseless. I was in extreme fear of my life.

The attack somewhat subsided. This allowed me to try and assess what was happening. I was face down on the ground and for the first time was able to move my head enough to see black boots, or shoes, and black pants of one of the attackers. I continued to move my eyes up the dark form standing nearest to my head. I saw a silvery object on the assailant's jacket that appeared to be a badge of some sort. I was beaten, bleeding, in excruciating pain and did not have my eyeglasses. I still was not sure who was attacking me. Helplessly, I could only say to myself, "Oh my God, Oh my God."

At this point I was handcuffed sharply with my arms behind my back and yanked to a slumped standing position. My back was starting to spasm from the blows I received there.

This was the first time I actually saw that there were several men. Many were in police uniform. I was asking, "What is going on?" There was no direct response to me but background talk that referred to the fact that "We got him!" I stated that they had the wrong person, that I was sleeping on the cushions and that this is my stepson's house.

Pet. App. 23a-26a.

As a result of the attack, Mr. Rogers sustained injuries to his head, arms, back, neck and legs, including scarring, permanent hearing loss, and nerve damage. *Id.*, 26a.

Dopke's claim that he had no reason to know that Deke might be used off leash cannot be accepted on this interlocutory appeal. During the Kennewick Police Department's investigation of these events, Kohn and Bonnalie both said that it was a "common and accepted" practice to use police dogs off leash. ER 69-70. The trial court noted that Rogers submitted evidence that Dopke knew canine dogs could be unleashed during searches. Pet. App. 74a.

Rogers' police dog expert testified:

> When this dog was released for the purpose of finding, it was a nonverbal command to apprehend, by attacking and biting the person he found;
>
> and
>
> The fact that the dog was given a call-off command and responded immediately demonstrates that the dog was under the control of Officer Kohen [sic] at all times . . .
>
> * * *
>
> The dog's immediate response to Officer Kohn's release command is conclusive evidence that the dog was used as an instrument of force (weapon) against Ken Rogers.

ER 400; 396.

The deployment of Deke to search and apprehend constituted a continued pursuit of a misdemeanor suspect in violation of a KPD policy that was intended to minimize risk to the public. ER 29, 43. Dopke called it a "pursuit." ER 43. Dopke retired to avoid a disciplinary loss of rank arising from these incidents. ER 52.

Procedural Background

Mr. Rogers and his wife, Mary Lou Rogers, sued the City of Kennewick and the individual officers in federal district court in the Eastern District of Washington, alleging a variety of state-law and civil rights claims. Pet. App. 27a. Richard and Jane Dopke moved for summary judgment based on qualified immunity. The remaining respondents moved for summary judgment based on the same ground. In two orders, the district court denied both motions for summary judgment. Pet. App. 7a, 19a. The Ninth Circuit unanimously affirmed the district court's orders in an unpublished opinion that has no precedential value in the Ninth Circuit or any of the district courts within that circuit. Pet. App. 1a.

Petitioners ask this Court to review the court of appeals' holding that they were not entitled to summary judgment on qualified immunity. Pet. 1 (06-616); Pet. 2 (06-626). This brief responds to both petitions.

REASONS FOR DENYING THE WRIT

Petitioners seek review on two limited questions: whether a seizure takes place when a police canine "unexpectedly" bites and holds an individual, and whether the officers in this case are entitled to qualified immunity.

Respondents limit their opposition to certiorari to responding to Petitioners' narrow questions.

In the pages that follow, Respondents explain that the decision below does not conflict with decisions of other courts of appeal or of this Court. It should be noted at the outset, however, that Respondents' rebuttal of Petitioners' claim of a split in authority – which is the basis upon which petitioners urge review – is not strictly necessary here because the Ninth Circuit's ruling did not itself establish circuit precedent. Rather, it affirmed the district court's decision that there were disputed issues of material fact on the Fourth Amendment and ancillary qualified immunity questions that precluded summary judgment in an unpublished decision that may not be cited as precedent in the courts of that circuit. Pet. App. 1a. That being the case, there *is no* Ninth Circuit ruling that can be said to conflict with the rulings of other circuits or of this Court. For that reason alone, this Court should deny review.

We now review the views of the lower courts on the questions presented, as if the Ninth Circuit had, in fact, issued a precedential opinion, and show that the other Circuits are in agreement.

A. THE LOWER COURTS AGREE THAT USING A CANINE AGAINST A NON-VIOLENT MISDEMEANANT VIOLATES THE FOURTH AMENDMENT.

The question whether the Fourth Amendment was violated here involves both whether Mr. Rogers was "seized" and whether the force use to effectuate that

seizure was "unreasonable." We treat those issues in turn, showing that there is no split in authority on either issue.

1. All Courts Would Agree That Mr. Rogers Was Seized When the Officers Employed the Canine to Search and Detain Him.

Petitioners argue that the court of appeals' holding is in tension with those of other courts regarding whether a canine can "seize" an individual in the absence of a specific verbal command by a police officer to seize a specific person (Rogers). There is no tension on this point: When an intentionally deployed canine detains a suspect, in the absence of a specific verbal command to seize that specific person, a seizure has taken place.

Every court that has considered whether an actively employed canine can "seize" a suspect has ruled consistently with the court of appeals. In *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998), the Fourth Circuit reached a conclusion identical to that reached by the Ninth Circuit. That court held that an intentionally deployed police dog who bit an innocent bystander, as opposed to the suspect for whom the dog was supposed to be searching, "seized" the bystander. Noting that "a police dog cannot discriminate between a criminal and an innocent person," the Fourth Circuit held that the seizure of the bystander was purposeful. *Id.* at 178. Other federal courts to consider whether a plaintiff's excessive force argument based on the intentional deployment of a canine have held, either explicitly or implicitly, that a seizure has taken place. *See United States v. Lawshea*, 461 F.3d 857, 860 (7th Cir. 2006); *Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir. 2003); *Gander v. Wood*, ___ F. Supp. 2d ___,

2006 WL 2945964 (D. Or. 2006); *Fidler v. City of Indianapolis*, 428 F. Supp. 2d 857 (S. D. Ind. 2006).

Contrary to Petitioners' argument, *Dennen v. City of Duluth*, 350 F.3d 786 (8th Cir. 2003), is consistent with the court of appeals' holding that an unleashed canine can seize an individual even in the absence of a verbal command. In *Dennen*, an officer and his unleashed canine chased a drunken suspect, who fell into a ravine and suffered brain injury. Although the Eighth Circuit ultimately held that the seizure in that case was reasonable because the suspect was fleeing while carrying an unidentifiable object, its holding presupposes that the plaintiff was seized. *Id.* at 791 ("The key inquiry is whether using a dog without a leash was objectively reasonable under the circumstances.").

Petitioners further argue that the court of appeals' decision is in tension with *Cardona v. Connolly*, 361 F. Supp. 2d 25 (D. Conn. 2005). There, the officer had placed the canine in the back of a cruiser from which the canine escaped. The officer was not actively using the animal during the course of the plaintiff's arrest, *id.* at 27, suggesting that no "seizure" had taken place. In this case, on the other hand, the police officers had intentionally deployed the canine to find and apprehend in the area around 6902 W. Umatilla. Pet. App. 22a. Thus, unlike *Cardona*, in which the officer did not intend to use the canine at the time of the bite and believed that the canine was not actively engaged, the police in this case intended that the canine assist in their search and seizure.[3]

[3] As Petitioners' concede (Pet. 06-616, p. 6), *Cardona* distinguished other cases in which the officers instructed a canine to find and seize a

(Continued on following page)

2. The Officers Intended to Seize Rogers.

Petitioners challenge the lower courts' conclusion that there is a disputed issue of material fact regarding the officers' intent. They argue that it is undisputed that the officers did not intend to seize Rogers. It is well-established that intent is a question of fact, *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983), which must be viewed in a light most favorable to the non-moving party on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this case, the district court and court of appeals, properly viewing the facts in the light most favorable to Respondents, correctly recognized that a genuine issue existed as to intent and left the issue for resolution by the jury.

The officers indisputably intended that the dog find and attack a person in Mr. Rogers' immediate vicinity. "Viewing the facts in the light most favorable to Rogers . . . [O]fficer Kohn had control over the dog when it bit Rogers, and Kohn had effectively ordered the dog to find and bite the individual he was tracking." Pet. App. 3a. This holding is clearly based on the testimony of Rogers' K-9 expert:

> When this dog was released for the purpose of finding, it was a nonverbal command to apprehend, by attacking and biting the person he found;

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suspect. *Cardona*, 361 F. Supp. 2d at 34 (distinguishing the Fourth Circuit's ruling in *Vanthekan* because, in *Cardona*, "as soon as [the officer] became aware of [the canine's] conduct, he acted swiftly in stopping [the canine's] attack"). *See also Adrade v. City of Burlingame*, 847 F. Supp. 760, 762 (N.D. Cal. 1994), *aff'd sub nom., Marquez v. Andrade*, 79 F.3d 1153 (9th Cir. 1996) (police dog escaped from police car before biting plaintiff).

Furthermore, after observing the canine biting Mr. Rogers, the officers allowed the canine to continue its attack, and joined in, proceeding to strike Mr. Rogers with their fists, knees, and flashlights. Pet. App. 24a-25a. Rogers stated:

> During the struggle with the unknown dog, I was spun 180 degrees, stumbling trying to gain my equilibrium and balance. My focus was entirely on getting the dog off my arm.
>
> . . . My back was now to the gate and fence, I could not see what was coming. I was then blind-sided with several blows from what felt like fists and baseball bats to my head, sides of my face, back and lower back. I was then driven into the ground as I was already collapsing from the multiple blows. . . . I was in the process of being beaten, kicked and bitten on my upper arm and neck by the dog. . . . I was completely overwhelmed and was defenseless.

Unlike the cases in which an officer attempts to restrain one person and accidentally restrains another, the officers in this case knowingly used *additional severe force* against Mr. Rogers *after the canine's initial attack,* rather than calling the dog off.

Finally, Petitioners argue that because officers are required to announce the presence of a canine to anyone within an enclosed area, there can be no finding of intent unless the officer verbally commanded the canine to "enter the backyard to find and hold" someone. Pet. in 06-616 at 8. First, this argument assumes that Kohn knew that an announcement prior to deploying Deke was required, or that he would not decide to ignore that requirement, both of which are contradicted by Kohn's failure to make such

an announcement before Deke was released in the driveway. Second, this argument is inconsistent with the case law. Several circuits have held that the release of a canine dog in the absence of a verbal warning can be unreasonable. *See Kuha v. City of Minnetonka*, 365 F.3d 590, 607 (8th Cir. 2003); *Kopf v. Wing*, 924 F.2d 265 (4th Cir. 1991) (reversing grant of summary judgment to defendants where officers did not issue a verbal warning before releasing canine). Indeed, most courts have held that the issuance of a warning prior to releasing a police dog militates *against* a finding of a Fourth Amendment violation. *See, e.g., Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 517 (9th Cir. 1999) (noting that officers gave three warnings in both Spanish and English before releasing police dog into a closed theater pursuant to burglary reports); *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660-61 (9th Cir. 1997) (officer gave two verbal warnings before sending police dog after fleeing suspect, who was drunk and had been harassing restaurant employees), *overruled on other grounds by Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005); *Matthews v. Jones*, 35 F.3d 1046, 1051 (6th Cir. 1994) (finding no excessive force as a matter of law where the officer warned plaintiff, a fleeing misdemeanant, several times before releasing the police dog to apprehend him); *Robinette*, 854 F.2d at 911 (holding fatal attack on suspect by police dog objectively reasonable where undisputed testimony showed that police shouted three warnings before releasing dog).

In fact, no court has ever held that the absence of a warning prior to the release of a police canine *precludes* a finding of intent. And for good reason. Under Petitioners' theory, an officer could avoid liability for a canine's conduct simply by declining to notify persons in enclosed

areas of the canine's presence. If silence provides unrebuttable evidence of an officer's lack of intent, police officers could employ overly aggressive and eager canines without fear of liability.

3. The Use of a Bite-and-Hold Canine to Detain a Non-Threatening Misdeamenant Violates the Fourth Amendment.

Petitioners argue that their conduct was reasonable. Pet. 06-616 at 14. This Court should deny review because the Circuits agree that using the level of force employed in this case is unreasonable when the suspect is not threatening and has committed only a minor offense.

To determine whether a Fourth Amendment violation has taken place, courts must first consider whether there is a "seizure," and then whether that seizure is unreasonable. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). Determining whether a seizure is unreasonable is a context-specific inquiry in which the court must gauge the officer's conduct in light of the severity of the crime, the threat posed by the suspect, and the degree to which the suspect evades arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

In this case, both lower courts agreed that the *Graham* factors weighed in favor of Mr. Rogers. The moped operator was guilty of no more than a misdemeanor and posed no threat to the officers. Given the moped driver's relatively minor offenses, and the absence of any indication that the driver posed a threat to the officers, the lower courts' decisions were correct. *See, e.g., Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006) (*Graham* factors weigh against finding of reasonableness when offenses are

minor and suspect poses no threat of harm); *Vinyard v. Wilson*, 311 F.3d 1340, 1347-48 (11th Cir. 2002) (same); *Loria v. Gorman*, 306 F.3d 1271, 1297 (2d Cir. 2002) (same). Furthermore, no court has found the use of a canine reasonable where the offense is a misdemeanor and the suspect poses no threat. Several courts have, however, held that the use of a police dog is unreasonable when the suspect poses no threat to the police. *See, e.g., Smith v. Hemet*, 394 F.3d 689, 703-04 (9th Cir. 2005); *Marley v. City of Allentown*, 774 F. Supp. 343, 345 (E.D. Pa. 1991), *aff'd*, 961 F.2d 1567 (3d Cir. 1992) (finding that the use of a police dog to pursue a suspected misdemeanant who posed no threat to the officer was unreasonable).

Because there is no disagreement among the courts regarding whether the use of a canine against a misdemeanant posing no risk to the police violates the Fourth Amendment, this Court should decline to review the lower court's decision.

B. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Petitioners argue that the lower courts erred in denying their motion for summary judgment based on qualified immunity. As to Sgt. Dopke, case law firmly established on July 13, 2003, that the authorization of a canine track and apprehend violates the Fourth Amendment. As to the remaining petitioners, the court of appeals decision affirmed the district court's conclusion that as of July 13, 2003, the following had been clearly established by case law: (1) failing to give a warning before releasing a police canine to bite and hold is unreasonable; (2) causing a bite-and-hold canine to enter an enclosed area is unreasonable even if the officers

believed that somebody was in that area; (3) allowing the canine, after it had attacked, to continue biting a helpless suspect for at least a minute was unreasonable; and (4) repeatedly striking a subdued and prone suspect is unreasonable. Pet App. 5a. This Court should not review the court of appeals' decision affirming the district court's analysis for two reasons: The lower court correctly determined that Petitioners were not entitled to qualified immunity, and review of that decision would not further develop the law in any meaningful way.

1. Officer Kohn, Officer Bonnalie, and Deputy Quackenbush Violated Respondents' Clearly Established Constitutional Rights.

The court of appeals correctly observed that Petitioners are not entitled to qualified immunity if the facts alleged show that the officers conduct violated a clearly established constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). For a constitutional right to be clearly established, it must be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (quotation omitted). In this case, the court of appeals correctly determined that, as of July 13, 2003, case law established that the officers' conduct violated Respondents' constitutional rights in four distinct ways. Pet. App. 5a. First, the case law clearly established that the Fourth Amendment prohibits the release of a bite-and-hold police dog without warning. *Kuha*, 365 F.3d at 598-99; *Vathekan*, 154 F.3d at 179 ("Fourth Circuit precedent in 1995 clearly established that failure to give a warning before releasing a police dog is objectively unreasonable in an excessive force context.").

Second, it was clearly established that it is objectively unreasonable to cause a bite-and-hold dog to enter into a backyard without a warrant. It is well established that a small fenced-in backyard is part of the "curtilage" of the home. *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986). It is also well established that police cannot intrude upon the curtilage of the home, absent exigent circumstances, without a warrant. *See, e.g., Smith v. Marasco*, 318 F.3d 497, 520 (3d Cir. 2003). Furthermore, it is clearly established that, like police officers, the use of police canines is limited by the Fourth Amendment. *See, e.g., Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir. 2003) (analyzing use of police canine under the Fourth Amendment); *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994).

Third, it was clearly established that allowing a canine to continue biting a suspect after the suspect is subdued is unreasonable. Construing the facts in the light most favorable to Respondents, Rogers was attacked by the canine and screamed. Pet. App. 24a-25a. He tried to fight the canine off one time, but was bitten again and thus began stumbling to regain his balance. Pet. App. 24a. When the officers entered the backyard, Rogers yelled and screamed to get free from the dog, but did not attack the dog or the officers. Pet. App. 25a. The officers struck Rogers repeatedly with "what felt like fists and baseball bats to [his] head, sides of [his] face, back and lower back," and Rogers was driven to the ground. *Id.* Only after Rogers was on the ground was the canine released. It is well established that the continued employment of a canine on a subdued individual violates the Fourth Amendment. *Mendoza*, 27 F.3d at 1362 ("[N]o particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine

on a handcuffed arrestee who has fully surrendered and is completely under control.").

Finally, it was clearly established that striking a subdued and prone suspect is unreasonable. *See, e.g.*, *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (excessive duration of a canine attack constitutes excessive force); *Phelps v. Coy*, 286 F.3d 295, 302 (6th Cir. 2002) (beating suspect after he was subdued constituted excessive force).[4]

2. Sgt. Dopke Violated Respondents' Clearly Established Constitutional Rights.

Petitioner Dopke incorrectly argues that as of July 13, 2003, it was not clearly established that "the authorization of a canine track was unconstitutional." Pet. App. 17. Not only does case-law establish that very proposition, but given the narrow construction of Sgt. Dopke's appeal and the limited effect review would have on this case and on future litigants, this Court should not review the court of appeals' decision as it pertains to Sgt. Dopke.

The courts below correctly held that it is clearly established that authorization of a canine to find and seize a fleeing suspect wanted for a traffic violation violates the Fourth Amendment. In *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), the Ninth Circuit held that the use of a canine

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[4] Petitioners argue that they are entitled to qualified immunity because it was not clearly established that the unintentional acts of a canine can violate the Fourth Amendment. Pet. App. 1 at 12. Again, insofar as Petitioners contend that the officers acted negligently as opposed to intentionally there exists a genuine issue of fact that must be construed in the Respondents' favor. *See supra* at p. 4.

to track and seize a fleeing suspect initially stopped for a traffic violation could be unreasonable.[5] *Id.* at 1433. Although the officers in *Chew* were entitled to qualified immunity, the court held that the officers who authorized the canine search could be held liable for the canine's actions. *Id.* at 1446. And, of course, there is one important difference between the officers' conduct in *Chew* and Sgt. Dopke's conduct; Sgt. Dopke had the benefit of the rule set forth in *Chew*, whereas the officers in *Chew*, by definition, did not. Thus, construing the facts in Respondents' favor, the court of appeals correctly held that Sgt. Dopke violated Mr. Roger's Fourth Amendment rights and that Sgt. Dopke was not entitled to qualified immunity.[6]

C. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN *BROWER* AND *LEWIS*.

Petitioners cite several cases that they allege are in tension with this Court's observation in *Brower v. County of Inyo*, 489 U.S. 593, ___ (1989), that "a seizure occurs

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[5] In fact, the officers in *Chew* released the canine after learning that the fleeing suspect had outstanding felony warrants. *Chew*, 27 F.3d at 1442. In this case, the only offense of which the officers were aware were "Troy's" failure to use proper lights and a helmet while operating a moped. Thus, the offense in this case is less severe, making the corresponding use of force less reasonable.

[6] In any event, even if the court of appeals had erred with regard to Petitioner Dopke's qualified immunity, that single narrow error would not warrant review by this Court. There is no question that the lower court correctly identified the proper legal standard for granting qualified immunity, and this Court rarely grants review when "the asserted error" is the "misapplication of a properly stated rule of law." *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . ").

even when an unintended person or thing is the object of the detention or taking." *See* Pet. in No. 06-626, at 10-13 (citing *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003), *Dunnigan*, 390 F.3d 486, and *Berg v. County of Alleghany*, 219 F.3d 261 (3d Cir. 2000)). Similarly, Petitioners argue that the lower courts' opinion is inconsistent with *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1989), in which this Court held that no Fourth Amendment seizure took place when a police car engaged in a high speed chase with a motorcycle accidentally killed a passenger on the motorcycle.

Petitioners' argument that the lower court's holding is in tension with *Lewis* is incorrect. Here, construing the facts in the light most favorable to respondents, Mr. Rogers was the *intended* object of the seizure. When the officers came upon the canine biting Mr. Rogers, rather than ordering the dog to release him, the officers struck him with their fists, knees, and flashlights. Pet. App. 32a. Thus, even if, taken in isolation, the initial canine attack did not constitute a seizure – which respondents would dispute – a seizure was indisputably effectuated as soon as the officers came upon Mr. Rogers, beat him, and arrested him. At that point, the officers knew that Mr. Rogers was the object of their actions. Insofar as the officers declined to order the canine to release Mr. Rogers and physically assaulted and placed him in handcuffs, there can be no argument that Mr. Rogers was the unintended object of the officers' intentional acquisition of physical control. Thus, even if there is inconsistency in the law as to whether an unintended object of an officer's conduct can be "seized," exist, that inconsistency is irrelevant to the resolution of this case.

Evidence that the officers intended to use the canine against Rogers distinguishes this case from the Sixth Circuit's holding in *Dunigan*. There, it was undisputed that the officers immediately "restrained and refocused" the canine upon realizing that the canine was attacking the plaintiff. *Dunigan*, 390 F.3d at 492-93. The evidence also indicated that the canine attacked because of the plaintiff's threatening motion; the canine's failure to attack another person in the house indicated that officers in that case had not actively employed the canine, but rather that it attacked based on a perceived threat. For the same reason, this case is easily distinguishable from other cases in which an officer mistakenly harmed a bystander. *See, e.g., Schultz v. Braga*, 455 F.3d 470 (4th Cir. 2006) (plaintiff shot by an errant bullet aimed at his companion was not seized under the Fourth Amendment); *Bublitz*, 327 F.3d at 489 (officers did not seize suspect's family when they deflated the fleeing suspect's tires); *Medeiros v. O'Connell*, 150 F.3d 164, 167 (2d Cir. 1998) (officers accidentally shot a hostage while intending to shoot a kidnapper).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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